Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-21–09 OF 2012(W)
RAUS SHARIF PCA, SURIYADI, AHMAD MAAROP, HASAN LAH AND ZALEHA ZAHARI FCJJ
27 NOVEMBER 2014

Civil Procedure — Judicial review — Whether application for judicial review appropriate — Enforcement officers from Ministry of Domestic Trade seized appellant's machinery from unlicensed factory on suspicion offence under Optical Discs Act 2000 had been committed — Seizure was in connection with investigations into suspected offence — Whether such statutorily permitted actions taken by law enforcement agencies in course of criminal investigations into suspected offence were not open to judicial review — Whether affected party could always file private action for damages if seizures were unlawful or made without reasonable cause

Acting on information received, enforcement officers from the Ministry of Domestic Trade and Consumer Affairs raided a factory of the appellant — a manufacturer of video compact discs — and seized machinery and equipment under the Optical Discs Act 2000 ('the ODA'). The appellant applied for judicial review initially for an order of mandamus (to compel the second respondent ('R2') to return the seized machines and equipment), an order of certiorari (to quash R2's decision not to release the machines and equipment), a declaration that R2's said decision was wrong in law and null and void and for damages suffered as a result of the 'unlawful seizure'. As the machinery and equipment were returned to the appellant before the judicial review application was heard, the appellant amended the same to abandon the prayers for mandamus and certiorari, re-worded the prayer for declaration to say that the seizure of the machinery and equipment and the damage caused to the appellant's premises in the process was carried out without reasonable cause and was unlawful, and that the respondents should pay the appellant damages as assessed by the court. The High Court's dismissal of the application for judicial review was upheld by the Court of Appeal. Both the courts below held that the appellant should have challenged the respondents' action by way of a civil writ action and not by way of judicial review. The appellant was granted leave to appeal to the Federal Court, inter alia, on the question whether judicial review was the proper mode to challenge the respondents' actions. The respondents argued that the appellant should have proceeded by way of a civil

writ action instead of judicial review. They also contended that the seizure of the machinery and equipment was lawful and permitted under the ODA in connection with investigations into the suspected commission of an offence under that Act; that the exercise of such statutory function was part of the investigation process of a law enforcement agency and as such was not an administrative decision that was amenable to judicial review.

Held, dismissing the appeal:

(1) Sections 38 and 39 of the ODA provided that if there was reasonable cause to believe that an offence under the Act was being or had been committed on any premises but the assistant controller had reasonable grounds for believing that if there was delay in obtaining a search warrant under s 38, the investigation would be adversely affected or evidence of the commission of an offence was likely to be tampered with, removed, damaged or destroyed, he may enter the premises and exercise all of the powers referred to in s 38 including the power of seizure under s 38(2) (see para 23).

(2) The seizure challenged by the appellant was an act done by the respondents' officers in the exercise of a function in relation to a criminal investigation for a suspected offence under the ODA. Such an exercise of power in the course of criminal investigation was not open to judicial review under O 53 of the Rules of Court. To hold otherwise would expose the criminal investigative processes of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of Parliament. A balance had to be struck between the right of disgruntled persons, such as the appellant, to seek redress in the form of damages for alleged wrongful seizure of its property and the duty of investigative agencies through its officers to bring wrongdoers to justice by arresting them and collecting, in the course of investigations, whatever evidence against them. The appellant was not without redress. It could have filed a private law writ action for damages. Indeed, s 48 of the ODA provided for a cause of action for recovery of damages if a seizure was made without reasonable cause (see paras 24–25).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, pegawai penguatkuasa daripada Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna menyerbu kilang perayu — pengeluar video cakera padat — dan merampas mesin dan peralatan di bawah Akta Cakera Optik ('ACO'). Perayu memohon untuk semakan kehakiman untuk perintah mandamus (untuk memaksa responden kedua ('R2') memulangkan mesin dan peralatan yang dirampas), perintah certiorari (untuk membatalkan keputusan R2 untuk tidak melepaskan mesin dan peralatan tersebut), perisytiharan bahawa keputusan R2 adalah salah dari

segi undang-undang dan batal dan tak sah dan untuk kerosakan yang dialami akibat 'unlawful seizure'. Memandangkan mesin dan peralatan dikembalikan kepada perayu sebelum permohonan semakan kehakiman didengar, perayu memindanya untuk meninggalkan permohonan-permohonan bagi mandamus dan certiorari, menyusun semula perkataan permohonan untuk perisytiharan bagi menyatakan bahawa perampasan mesin dan peralatan dan kerosakan yang dilakukan kepada premis perayu dalam proses yang dijalankan adalah tanpa sebab yang munasabah dan salah di sisi undang-undang, dan bahawa responden-responden patut membayar perayu ganti rugi seperti yang ditaksirkan oleh mahkamah. Penolakan Mahkamah Tinggi terhadap permohonan untuk semakan kehakiman disahkan oleh Mahkamah Rayuan. Kedua-dua mahkamah bawahan memutuskan bahawa perayu patut mencabar tindakan responden-responden melalui tindakan writ sivil dan bukan melalui semakan kehakiman. Perayu diberikan izin untuk merayu kepada Mahkamah Persekutuan, antara lain, atas soalan sama ada semakan kehakiman adalah cara untuk mencabar tindakan responden-responden. Responden-responden berhujah bahawa perayu patut meneruskan melalui tindakan writ sivil dan bukan semakan kehakiman. Mereka juga berhujah bahawa perampasan mesin dan peralatan adalah sah dan dibenarkan di bawah ACO berhubung dengan siasatan perlakuan kesalahan yang disyaki di bawah Akta tersebut; bahawa pelaksanaan fungsi statutori sedemikian adalah sebahagian proses siasatan agensi penguatkuasaan undang-undang dan dengan itu bukan keputusan pentadbiran yang terbuka kepada semakan kehakiman.

Diputuskan, menolak rayuan:

(1) Seksyen 38 dan 39 ACO memperuntukkan bahawa jika terdapat sebab munasabah untuk mempercayai bahawa kesalahan di bawah Akta telah dilakukan ke atas mana-mana premis tetapi penolong pengawal mempunyai alasan munasabah untuk mempercayai bahawa jika terdapat kelewatan dalam memperolehi waran carian di bawah s 38, siasatan akan terjejas atau keterangan perlakuan kesalahan mungkin diubah, dikeluarkan, rosak atau dimusnahkan, beliau boleh memasuki premis tersebut dan menjalankan kesemua kuasa yang dirujuk dalam s 38 termasuk kuasa merampas s 38(2) (lihat perenggan 23).

(2) Perampasan yang dicabar oleh perayu adalah tindakan yang dilakukan oleh pegawai-pegawai responden-responden dalam menjalankan fungsi berkaitan kepada siasatan jenayah bagi kesalahan yang disyaki di bawah ACO. Pelaksanaan kuasa sedemikian dalam perjalanan siasatan jenayah adalah bukan terbuka kepada semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah. Untuk memutuskan sebaliknya akan mendedahkan proses siasatan jenayah kesemua agensi penguatkuasaan undang-undang dalam negara kepada semakan kehakiman berterusan yang mana semestinya bukan niat Parlimen. Imbangan perlu dibuat di antara hak seorang yang tidak puas hati, seperti perayu, untuk memohon

tebus rugi dalam bentuk ganti rugi bagi perampasan salah yang didakwa terhadap hartanahnya dan kewajipan agensi siasatan melalui pegawai-pegawainya untuk membawa orang yang bersalah kepada keadilan dengan menangkap mereka dan mengutip, semasa siasatan, apa-apa keterangan terhadap mereka. Perayu adalah tanpa tebus rugi. Ia boleh memfailkan tindakan writ undang-undang swasta untuk ganti rugi. Sememangnya, s 48 ACO memperuntukkan kausa tindakan untuk mendapatkan kembali ganti rugi jika perampasan dibuat tanpa sebab yang munasabah (lihat perenggan 24–25).]

Notes

For cases on judicial review in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5993.

Cases referred to

Ahmad Azam bin Mohamad Salleh & Ors v Jabatan Pembangunan Koperasi Malaysia & Ors [2004] 4 MLJ 86, HC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 5 MLJ 773, CA (refd)

City Growth Sdn Bhd & Anor v The Government of Malaysia [2006] 1 MLJ 581; [2005] 7 CLJ 422, HC (folld)

Datuk Seri Ahmad Said Hamdan, Ketua Suruhanjaya, Suruhanjaya Pencegah Rasuah Malaysia & Ors v Tan Boon Wah [2010] 3 MLJ 193, CA (refd)

Hashim bin Saud v Yahaya bin Hashim & Anor [1977] 2 MLJ 116, FC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124, HL (refd)

Ooi Ah Phua v Officer-in-charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

R v Sloan [1990] 1 NZLR 474, HC (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 50(1)

Courts of Judicature Act 1964 Schedule, para 1

Criminal Procedure Code

Optical Disc Regulations 2000 reg 6(6)

Optical Discs Act 2000 ss 36(1), (2), (3), 38, 38(1), (2), 39, 48

Rules of the High Court 1980 O 53, O 53 rr 3(2), 5(1), 5(1)(a) 5(1)(b) A
Rules of the Supreme Court [UK] O 53
Specific Relief Act 1950 s 41

Appeal from: Appeal No W-01–222–10 (Court of Appeal, Putrajaya) B

Cecil Abraham (S Nathan Balan, Gabriel Daniel and Paul Ong with him) (Paul Ong & Assoc) for the appellant.
Syamsul B Bolhassan (Muzila bt Mohamed Arsad with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

C

Ahmad Maarop FCJ:

[1] This is an appeal by the appellant (the applicant in the High Court) against the judgment of the Court of Appeal given on 5 April 2012 which affirmed the judgment of the High Court. The High Court had, on 9 March 2010, dismissed with costs the appellant's application for judicial review against the respondents. The appellant obtained leave from this court to appeal on the following questions ('the leave questions'): D

1. Whether a challenge to the exercise or the purported exercise of any power conferred under the Optical Discs Act 2000 (Act 606) in particular the power to seize any article, optical disc, thing, book or document should be made by way of judicial review or otherwise. E

[Samada suatu cabaran kepada perlaksanaan atau perlaksanaan yang kononnya dibuat berdasarkan apa-apa kuasa di bawah Akta Cakera Optik 2000 (Akta 606) khususnya kuasa untuk menyita sebarang artikel, cakera optik, barang, buku atau dokumen harus dibuat melalui semakan kehakiman atau sebaliknya.] F

2. Whether in a judicial review application which challenges the validity of the respondents' decision, as a raiding party, to seize any article, optical disc, thing, book or document under Section 38 (7) of the Act 606, it is necessary for the respondents to justify the need for such seizure as being reasonably necessary in the context of the purpose for which the raid was conducted. G

[Samada di dalam permohonan semakan kehakiman yang mana mencabar kesahihan keputusan Responden-Responden, sebagai pihak yang menyerbu, untuk menyita sebarang artikel, cakera optik, barang, buku atau dokumen di bawah Seksyen 38(7) Akta 606, ianya adalah perlu bagi Responden-Responden untuk menunjukkan terdapat alasan kukuh untuk penyitaan itu sebagai sesuatu perkara munasabah yang perlu di dalam konteks tujuan yang mana serbuan tersebut telah dibuat.] H

3. Whether what constitutes 'reasonable cause' and 'reasonable belief' as described in Sections 48 and 52(b) of Act 606 was an objective test. I

[Samada apa yang menjadi 'sebab yang munasabah' dan 'kepercayaan yang munasabah' seperti mana yang dinyatakan di dalam Seksyen-Seksyen 48 dan 52(b) Akta 606 adalah suatu ujian objektif.]

A 4. Whether a claim for damages in a judicial review application can be grounded solely on the basis that there has been an infringement of the principles of administrative law.'

[Samada suatu tuntutan ganti rugi di dalam suatu permohonan semakan kehakiman boleh berasaskan atas dasar bahawa telah terdapat perlanggaran
B prinsip-prlnsip undang-undang pentadbiran semata- mata.]

[2] The background facts leading to this appeal are these. At the material time the appellant was in the business of manufacturing video compact discs. It was licenced under reg 6(6) of the Optical Disc Regulations 2000 ('the Optic
C Regulations') to manufacture optical discs from 19 March 2005 to 18 March 2006 vide licence No KCO-16/6. The Manufacturer's Code for the two machines stated in the licence were IFPI NM01 and IFPI NM02 respectively. The appellant was licensed to operate at No 200, Jalan 1, Taman Perindustrian Ehsan Jaya Kepong, 52100 Kuala Lumpur ('the licensed premises'). Vide the
D letter dated 20 June 2005, the Kementerian Perdagangan Dalam Negeri (KPDN) approved the appellant's application to upgrade the following two replicating machines of the appellant:

(i) Nama mesin : Krauss Massei KM80-190 CD94.
E No Siri Acuan : 73475/212.
Kod Pengilang : IFPI NM01; and
(ii) Nama mesin : Krauss Massei KM80-190 CD94.
No Siri Acuan : 73475/157.
Kod Pengilang : IFPI NM02.

F

[3] On 2 March 2006, acting on information received, KPDN officers conducted a raid on the appellant's new factory at SD11, Jalan KIP 11 Taman Perindustrian KIP, 52100 Kuala Lumpur ('the new factory'), and seized the machines and equipment listed in the search list (exh L6). At the time of the
G raid, the appellant had yet to obtain from the respondents the approval to move its operation to the new factory. The 'Staeg HamaTech' machine and 'Amwell DVD Smartline' machines seized at the new factory were different from the ones in respect of which approval to upgrade was given. On 19 September 2006 the appellant filed an application for judicial review (encl 1). The
H application was originally for an order of certiorari and mandamus, as well as for declaration and damages in respect of the machinery and equipments from the new factory, which the appellant alleged was unlawfully seized. The order of certiorari prayed for was to quash the decision of the second respondent who the appellant alleged, had decided not to release the seized machinery and
I equipment. The order of mandamus prayed for was to compel the second respondent to release and return the said machinery and equipment seized within seven days from the date of the order in good functional condition. The declaration sought was for an order to declare that the decision of the second defendant not to release the seized machinery and equipment was wrong in law

and therefore null and void. The following special damages were prayed for: A

(a) RM3,888,000.00 for *loss of use* of an offset printing machine seized for the period of 2nd March 2006 to September 2006 and future damages thereafter from October until date of order;

(b) RM14,688,000.00 for *loss of revenue* from March 2006 to September 2006, and further sums from October 2006 until date of order, or such amount as may be assessed by this court from March 2006 until date of order; and B

(c) special damages of RM185,999.00 as *repair costs to the factory* or such damages as may be assessed by this court; and C

(d) *damages for repair costs* to the seized machineries once these are released and an expert engineer has assessed and given a quotation.

[4] On 10 August 2009, with the leave of the court, encl 1 was amended, limiting the reliefs sought to a declaration, and an order for damages to be assessed as follows: D

(1) *satu perintah deklarasi bahawa penyitaan mesin-mesin, peralatan dan barangan Pemohon oleh Responden-Responden pada 02 March 2006 hingga 04 March 2006 di kilang Pemohon di SD11 Jalan KIP 11 Taman Perindustrian KIP 52100 Kuala Lumpur ('premis tersebut') serta kerosakan ke atas premis tersebut akibat penyitaan tersebut telah dilaksanakan tanpa sebab yang munasabah dan adalah salah di sisi undang-undang*; E

(2) *ganti rugi yang dialami oleh Pemohon akibat penyitaan oleh Responden-Responden ditaksirkan oleh Mahkamah yang mulia dan dibayar oleh Responden-Responden kepada Pemohon*. F

[5] O 53 r 5(1) of the RHC provides that in an application for judicial review the court may award damages if two requirements are fulfilled. Rule 5(1)(a) provides for the first requirement, ie 'if (the applicant) has included in the statement in support of his application for leave under rule 3, a claim for damages arising from any matter to which the application relates'. Rule 5(1)(b) provides the second requirement — 'if the court is satisfied that, if a claim has been made in an action begun by the applicant at the time of making his application, he could have been awarded damages'. It is therefore crucial to consider the statement made by the appellant pursuant to O 53 r 3(2) of the RHC. It is clear from the statement made pursuant to O 53 r 3(2) of the RHC, in support of the appellant's amended application for leave for judicial review the prayers for certiorari and mandamus were abandoned and the prayer for the declaratory relief amended. The crux of the appellant's complaint in the amended judicial review application is therefore narrower and more specific — the impugned seizure was done without reasonable cause (and therefore wrong in law) resulting in damages to the machines and the new factory. The appellant contended it was entitled to recover damages. That was the pleaded G H I

A case of the appellant. The amendment became necessary because before the application for leave for encl 1 was heard, the second respondent returned the machines and equipment.

B **[6]** It must also be noted that the prayers relating to special damages for the loss of use of an offset printing machine seized (RM3,888,000), the loss of revenue (RM14,688,000), cost of repair to the factory (RM185,999) and damages for the seized machineries referred to in para 3 of this judgment, were also abandoned.

C IN THE COURTS BELOW

[7] In his judgment the learned judge of the High Court, concluded as follows:

D > It then appears that a claim for damages in a judicial review application cannot be grounded only on the basis that there has been 20 merely an infringement of the principles of administrative law. The applicant has to proceed further and establish that he has a right to damages at private law if initiated in an ordinary action. In the context of the Optical Discs Act, as we have seen, Section 48 limits the claim for
E > damages where a seizure is made 'without reasonable 25 cause'. *A claim for damages, on the facts of this application, and on the basis of my earlier finding that there was reasonable cause in exercise of an investigative function, cannot therefore succeed.*
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> Application for judicial review dismissed with costs to be taxed, unless agreed.

F **[8]** That decision was upheld by the Court of Appeal. Thus, although no written judgment was furnished, it must be concluded that the Court of Appeal accepted the reasoning of the High Court as well.

DECISION OF THIS COURT THE FIRST LEAVE QUESTION

G

The first leave question

[9] On the first leave question which learned counsel for the appellant submitted should be answered in the affirmative, the thrust of the learned
H counsel's argument was that the courts below took the view that the proper approach to challenge any exercise of power under Act 606 was by way of a writ of civil action rather than by judicial review. Learned counsel submitted that the decisions of the courts below were not in consonant with established principles of administrative law. He contended that on the contrary, the courts
I in Malaysia had always been willing to acknowledge and accept the wide powers accorded under para 1 of the Schedule to the Courts of Judicature Act 1964. In support learned counsel referred to the majority decision of this court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another*

appeal [1996] 1 MLJ 481.

[10] In support of his contention that the proper mode to challenge the decision of a public authority would be by way of an application for judicial review, the learned counsel also referred to the decisions of the Court of Appeal in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773 and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413.

[11] The thrust of the submission of the respondents is that judicial review was not the proper mode of bringing the appellant's case to court. The learned senior federal counsel ('SFC') pointed out that the judicial review application was amended on 10 August 2009, limiting it to a prayer for declaration that the seizure of the machines, equipments and goods and the damages caused to them was the result of seizure which was carried out without reasonable cause, and wrong in law. The learned SFC submitted that as a result of the amendment, the judicial review application had been transformed into an action for damages under s 48 of Act 606 and the reasonable and probable cause in respect of the impugned seizure were the elements which must be proved. The learned SFC contended that the application therefore had become very much facts based and that the proper and appropriate mode for adjudicating such a case is by way of a writ for a civil action, not an application for judicial review. In support of his submission the learned SFC relied on the decision of this court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865.

[12] The learned SFC also submitted that the respondents enforcement officers were investigating into an offence suspected to have been committed under Act 606. In the course of such investigations such officers were empowered under Part VII of Act 606 to seize the machines and equipment in question. He argued that the exercise of such a statutory power was not an administrative decision and was therefore not reviewable under O 53 of the RHC. According to the learned SFC, the impugned seizure was an exercise of a statutory function under Act 606 and was part and parcel of the investigative process towards a criminal prosecution for an offence under Act 606. In any case, the learned SFC submitted that on the facts and circumstances of the case, the impugned seizure was lawful. In support of his submission he relied on *Ahmad Azam bin Mohamad Salleh & Ors v Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86, *City Growth Sdn Bhd & Anor v The Government of Malaysia* [2006] 1 MLJ 581; [2005] 7 CLJ 422 and *R v Sloan* [1990] 1 NZLR 474.

[13] The first part of the first leave question which relates to 'the exercise or the purported exercise of any power under Act 606' is to our mind too general.

There are a number of powers under Act 606 the exercise of which could be subjected to challenge. We do not think it is appropriate that a fit-all answer should be provided in relation to the exercise of any of those powers. Besides, such an answer would merely be an unnecessary academic exercise given the context and the factual matrix of this case which are comparatively within a narrow compass. In our view, in the context of the present case, the more specific question would be whether a challenge to the exercise or the purported exercise of the power to seize the machinery and equipment should be made by way of judicial review or otherwise.

[14] In *Ahmad Jefri*, this court explained the exercise of supervisory jurisdiction by the High Court under O 53 of the RHC and para 1 of the Schedule to the Courts of Judicature Act 1964. It said (at pp 874–875):

> [7] In Malaysia, the exercise of the supervisory by the High Court over such bodies is found in O 53 of the RHC bears the heading: 'Application For Judicial Review'. And r 1 of O 53 of the RHC reads:
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> > This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purpose therein specified.
>
> [8] Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 reads:
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> > *Prerogative writs*
> >
> > Power to issue to any person or authority directions, order or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them or any purpose.
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> [9] However O 53 r 2(1) of thr RHC excludes 'an order for habeas corpus' but under r 2(2) it says that 'an application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter'.
>
> [10] But a relief by way of a declaration is also provided for under O 15 r 16 of the RHC which says:
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> > No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.
>
> [11] It was due to this provision (O 15 r 16 of the RHC) that before the current O 53 RHC was amended on 22 September 2000, there were a series of cases concerning the appropriate procedure to be used when seeking a declaratory judgment against a decision of a public authority: by way of writ action or under the procedure as set out in O 53 of the RHC (before the amendment to the current position).

[15] The principal issue before this court in *Ahmad Jefri* was whether the appellant could commence his action by writ or originating summons instead of an application for judicial review under O 53 of the RHC? The court considered the decision of the House of Lords in *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124 in which Lord Diplock set out the development of the law on judicial review, and highlighted the advantages and disadvantages of the English O 53 which was in pari materia with our O 53. This court then referred to the following statement in the judgment of Lord Diplock:

> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringement of rights under private law if such infringements should be involved, *it would in my view as a general rule be contrary to public policy, and an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities.*
>
> My Lords, I have described this as a general rule, for, though it may normally be appropriate to apply it by the summary process of striking out the action, *there may be exceptions, particularly where the validity of the decision arise as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons*. Whether there should be other exception should in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis:
>
> > a process that Your Lordship will be continuing in the next case in which judgment is to be delivered today (see *Cocks v Thanet DC* [1982] 3 All ER 1135).

[16] In explaining the principle distilled in O'Reilly which it applied, this court in *Ahmad Jefri* said:

> If the claim for infringement is based solely on substantive principles of public law then relief must be by way of an application for judicial review under O 53 of the RHC. If it was commenced by writ or by originating summons then this would be considered an abuse of the court's process and should be struck out under O 18 r 19(1) of the RHC. *But if the matter is under private law though concerning a public authority, O 53 RHC is not suitable. But the distinction and the boundaries between public law and private law are difficult to ascertain in practice though in principle it is clear*. Further, what would happen if a matter is a mixture of public law and private law? In our instant appeal, there is also the argument that O 15 r 16 of the RHC read with s 41 of the Specific Relief Act 1950, allows a claimant seeking declaratory relief to commence his claim by writ or originating summons.

[17] The court then asked the preliminary question, whether the appellant's complaint was amenable for judicial review:

A [21] *In view of this, let us begin by first asking ourselves a preliminary question: is the appellant's complaint or grievance amenable for judicial review (before even considering whether the procedure adopted by him is appropriate)? If his complaint is not amenable for judicial review then there is no dispute as to the procedure adopted since he is at liberty to commence his action by way of writ or originating summons. So first we have to* B *determine the parameters of matters which are amenable for judicial review.*

[22] *It is widely accepted that not every decision made by an authoritative body is suitable for judicial review*. To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a C statutory power (see para 61 *Halsbury Laws of England*, 4th Ed, 2001 Reissue, Vol 1(1)).

[18] Reverting to the instant appeal, following *Ahmad Jefri*, at the outset, the D preliminary question to be asked is whether the appellant's complaint or grievance is amenable for judicial review. As we have said, the complaint of the appellant in the amended judicial review application is narrower and more specific — the impugned seizure was done without reasonable cause (and therefore wrong in law) resulting in damages to the machines and the new E factory, which the appellant contended it was entitled to recover. This brings into focus the power of the respondents' officers to make the seizure. Section 36(1) of Act 606 provides that any assistant controller or a police officer not below the rank of inspector shall have the power to investigate any offence under the Act. Under s 36(2) of Act 606, the assistant controller may F issue orders to a licensee to further his investigation and secure compliance with the Act. Section 36(3) of Act 606 provides that in addition to the powers under s 36(1) and (2) of the Act, an assistant controller investigating an offence under the Act, may exercise all or any of the powers in relation to police investigation in seizable cases given by the Criminal Procedure Code.

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[19] To facilitate the investigation of offences under Act 606, the respondents' officers are provided with the powers of search and seizure with and without warrant respectively under ss 38 and 39 of Act 606. The powers of search with a warrant are provided for under s 38 of Act 606 which provides H that:

> 38(1) If it appears to a Magistrate, upon written information on oath and after such inquiry as he considers necessary, that there is reasonable cause to believe that an offence under this Act is being or has been committed on any premises, the Magistrate may issue a warrant authorizing any Assistant I Controller or police officer not below the rank of Inspector named therein to enter the premises at any reasonable time by day or by night, with or without assistance and if need be by force.
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> (2) An Assistant Controller or a police officer not below the rank of Inspector may, in the premises entered under subsection (1), search and

seize any article, optical disc, thing, book or document, including computerized data, which contain or is reasonably believed to contain information as to any offence suspected to have been offence under this Act.

(3) An Assistant Controller or a police officer not below the rank of Inspector conducting a search under subsection (1) may, if in his opinion it is reasonably necessary to do so for the purpose of investigating into the offence, search any person who is in or on such premises but no female person shall be searched except by another female person.

(4) An Assistant Controller or a police officer not below the rank of Inspector entering any premises by virtue of this section may take with him such other persons and such equipment as may appear to him necessary.

(5) An Assistant Controller or a police officer not below the rank of Inspector shall, on leaving any premises, if the premises are unoccupied or the occupier is temporarily absent, leave the premises as effectively secured against trespassers as he found them.

(6) An Assistant Controller or a police officer not below the rank of Inspector making a search of a person under subsection (3) may seize, detain or take possession of any article, optical disc, thing, book or document found on such person for the purpose of the investigation being carried out by such officer.

(7) Where, by reason of its nature, size or amount, it is not practicable to remove any article, optical disc, thing, book or document, seized under this section, the seizing officer shall, by any means seal the article, optical disc, thing, book or document in the premises or container in which it is found.

(8) A person who, without lawful authority, breaks, tampers with or damages the seal referred to in subsection (7) or removes any to do so commits an offence.

[20] Thus under s 38(1), a search warrant is issued if a magistrate is satisfied that 'there is reasonable cause to believe that an offence under the Act is being or has been committed in any premises'. If a search warrant is issued by the magistrate, the assistant controller named in the warrant is authorised to enter the premises at any reasonable time by day or night.

[21] Under s 38(2) an assistant controller may, in the premises entered (pursuant to a search warrant under s 38(1)) search and seize any article, optical disc, thing, book or document, including computerized data, 'which contain or is reasonably believed to contain information as to any offence suspected to have been committed and is likely to disclose evidence of the commission of any offence under this Act'.

[22] Section 39 of Act 606 provides for search and seizure without warrant. It provides:

> 39. Where an Assistant Controller or a police officer not below the rank of Inspector in any of the circumstances referred to in section 38 has reasonable grounds for believing that by reason of the delay in obtaining a search warrant under that section *the investigation would be adversely affected or evidence of the commission of an offence is likely to be tampered with, removed, damaged or destroyed*, the Assistant Controller or police officer not below the rank of Inspector may enter the premises and exercise all the powers referred to in section 38 in as full and ample a manner as if he were authorized to do so by a warrant issued under that section.

[23] The effect of the section is that if there is reasonable cause to believe that an offence under Act 606 is being or has been committed on any premises, but the assistant controller has reasonable grounds for believing that *by reason of the delay in obtaining a search warrant* under s 38, the investigation would be adversely affected or evidence of the commission of an offence is likely to be tampered with, removed, damaged or destroyed, the assistant controller may enter the premises and exercise all of the powers referred to in s 38, including the power of seizure under s 38(2).

[24] Thus it is clear to us that the seizure challenged by the appellant in its judicial review application was an act done by the respondents' officers in the exercise of a function in relation to a criminal investigation for an offence under Act 606. In our view such an exercise of power in the course of a criminal investigation is not open to review under O 53 of the RHC. To hold otherwise would, to our mind, be exposing the criminal investigative process of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of parliament. A balance has to be struck between the right of disgruntled persons such as the appellant, to seek redress in the form of damages for the alleged wrongful seizure of its property and the duty of the investigative agency through its officers to bring wrongdoers to face justice by arresting them and collecting, in the course of investigation, whatever evidence against them. In this connection the need to conduct prompt and unimpeded criminal investigation is well recognised by the court (see *Ooi Ah Phua v Officer-in-charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116, *Datuk Seri Ahmad Said Hamdan, Ketua Suruhanjaya, Suruhanjaya Pencegah Rasuah Malaysia & Ors v Tan Boon Wah* [2010] 3 MLJ 193). If decisions made and actions taken in the process of criminal investigation pursuant to the power given by law, such as the impugned seizure in this case are amenable to judicial review, then criminal investigative machinery may not function smoothly and efficiently as it should be. In this regard, we would approve the decision on similar point made by the Kuala Lumpur High Court in *City Growth Sdn Bhd & Anor v The Government of Malaysia* [2006] 1 MLJ 581. In this case, the applicants sought leave to commence proceedings under

O 53 r 3 of the RHC for an order of certiorari to quash an order dated 5 July 2004 made by the deputy public prosecutor which was served on Hong Leong Bank Bhd and EON Bank Bhd. The orders sought to effect a seizure of, inter alia, movable property in the banking accounts of the applicants pursuant to s 50(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA'). The crucial question https://www.youtube.com/user/TheKellysRule or the determination of the court was whether the said orders of the deputy public prosecutor pursuant to s 50(1) of the AMLA was reviewable by way of judicial review. In his judgment, dismissing the application for leave for an order of certiorari, Raus J (as His Lordship then was) said:

> [11] From the above, it can be seen that the deputy public prosecutor's order was in pursuant to s 50(1) of the AMLA. Section 50(1) of the AMLA is in the following words:
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> > (1) Where the Public Prosecutor is satisfied on information given to him by an investigation officer that any movable property, including any monetary instrument or any accretion to it, which is the subject-matter of an offence under subsection 4(1) or evidence in relation to the commission of such offence, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.
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> [12] Looking at the order of the deputy public prosecutor as well as the provision of s 50(1) of the AMLA, I am of the view that the order of the deputy public prosecutor *is not reviewable* under O 53 of the RHC. *To me, s 50(1) of the AMLA is part and parcel of the investigation process into an offence under s 4(1) of the AMLA*. It appears that in order to facilitate the investigation into the offence of money laundering, the law has provided with the public prosecutor the power to assist the investigating officer. Clearly, s 50(1) of the AMLA was enacted to enable the public prosecutor or his deputy to make *an order of seizure of movable properties in the possession of the financial institutions* by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. Thus, by issuing the said orders the deputy public prosecutor was merely exercising a function under AMLA.
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> [13] It has been said before that not all decisions and action of a public officer is reviewable by the court. In *R v Sloan* [1990] 1 NZLR 474, Justice Hardie Boys said:
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> > *... it is not every decision made under statutory authority that is subject to judicial review. A decision must go beyond what is merely administrative or procedural* ... or the exercise of a function rather than a power... Quite plainly, the conclusions reached by the inspector here are of this kind and so are not reviewable. *To hold otherwise would, as Mr Neave submitted, open up the investigation process of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament*.

A [14] Similarly, in *Ahmad Azam bin Mohamed Salleh & Ors v Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86, I held that the public officers exercising a function under the Cooperative Societies Act 1993, is not reviewable under O 53 of the RHC.

B [15] *Likewise in this case, the order of the deputy public prosecutor under s 50(1) of the AMLA is also not reviewable. This must be so, otherwise if all decisions and action of public authority of this nature are amendable to court's review, then the government machinery may not be able to function smoothly. The investigation process of all law enforcement agencies will be open to constant judicial review.To borrow the words of Justice Hardie Boys in R v Sloan 'that cannot have been the intention of Parliament'.*

C [16] It is submitted by learned counsel for all applicants that the issuing of the s 50(1) order, the deputy public prosecutor has crippled their business and has further failed to appreciate that the said orders would subject them and its directors and officers to liabilities resulting from their inability to utilize its funds. But as stated earlier, the s 50(1) order is to secure the evidence for the purpose of criminal D prosecution under s 4(1) of the AMLA. It is not an administration decision but a decision in relation to criminal investigation. Thus, the rights of all applicants in the four cases lies in the criminal, as well as civil law and not in an administration action. The deputy public prosecutor was performing his duties under s 50(1) of the AMLA and cannot be made accountable by way of judicial review.

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[25] Similarly in the present appeal, the seizure was made in the course of a criminal investigation of an offence under Act 606 pursuant to the powers conferred under the Act. Such seizure clearly is not amenable to judicial review. F The appellant was not without redress. It could have filed a private law writ action for damages. Indeed, s 48 of Act 606 provides for a cause of action for recovery of damages if a seizure is made without reasonable cause.

[26] Our answer to the first leave question as modified by us therefore is that, G a challenge to the exercise or a purported exercise of the power to seize the machinery and equipment in this case should be made by way of an ordinary private law action for damages. This would be sufficient to dispose of the present appeal. There is no necessity for us to answer the rest of the leave questions.

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[27] In the result the appeal is dismissed with costs.

[28] For the record, this is the last judgment involving our learned sister I Zaleha Zahari FCJ.

Appeal dismissed with costs.

Reported by Ashok Kumar